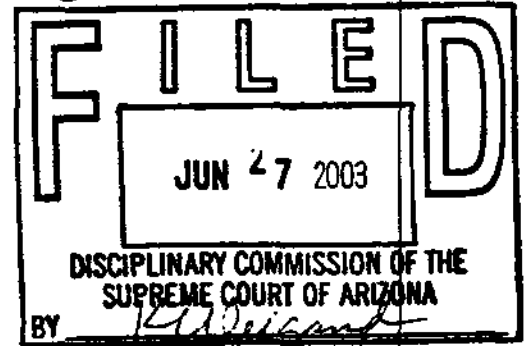


1 Karen Clark, Bar No. 012665  
2 Senior Bar Counsel  
3 State Bar of Arizona  
4 111 West Monroe, Suite 1800  
5 Phoenix, Arizona 85003-1742  
6 Telephone (602) 340-7247



7  
8 **BEFORE THE DISCIPLINARY COMMISSION**  
9 **OF THE SUPREME COURT OF ARIZONA**

10 IN THE MATTER OF A MEMBER )  
11 OF THE STATE BAR OF ARIZONA, )

File No. 00-1999, 02-0790, 02-2093  
and 03-0097

12 **WILLIAM B. FORTNER,** )  
13 **Bar No. 004923** )

**TENDER OF ADMISSIONS**  
**AND AGREEMENT FOR**  
**DISCIPLINE BY CONSENT**

Respondent. )

14 The State Bar of Arizona and Respondent, through his counsel J. Scott  
15 Rhodes, submit this Agreement pursuant to Rule 56(a), Ariz.R.S.Ct., and the  
16 guidelines for discipline by consent issued by the Disciplinary Commission of  
17 the Supreme Court of Arizona.

18  
19 Respondent conditionally admits failing to diligently represent clients, and  
20 failing to adequately supervise non-attorney staff. Respondent also conditionally  
21 admits failing to properly manage his client trust account. Respondent  
22 conditionally admits violating ERs 1.3, 1.15, 5.3 and 8.4(d) and Rules 43 and 44,  
23 Ariz.R.S.Ct. The parties agree that a censure and costs, as more fully set forth  
24 herein, is the appropriate sanction, subject to review and acceptance by the  
25

1 Disciplinary Commission. Restitution is not appropriate in this case, for the  
2 reasons discussed herein. Respondent will be placed on probation for a term of  
3 two years, to include terms as set forth herein, including LOMAP and a Practice  
4 Monitor.  
5

6 **FACTS**

- 7 1. Respondent is, and was at all times relevant hereto, a member of the State Bar  
8 of Arizona, having been admitted to practice law in Arizona on June 1, 1977.  
9

10 **COUNT ONE (Bankruptcy Matters)**

- 11 2. The State Bar received a copy of a letter from William Pierce, a United States  
12 Bankruptcy Trustee ("the Trustee"), dated September 12, 2000, expressing the  
13 Trustee's concerns regarding Respondent's bankruptcy practice. The letter  
14 provided information concerning ten cases in which Respondent represented  
15 the Debtors, as follows:  
16

- 17 a. Bruce and Pamela Stull (00-06851-PCT SSC): While there were  
18 claims listed on the schedules attached to the Stulls' petition, almost  
19 half of the claims are listed as "unknown", or had no account numbers,  
20 thereby hindering the Trustee's ability to be able to object to a claim.  
21 Respondent, on the Attorney Disclosure of Compensation form,  
22 checked the "Source" box but did not specify the source. Respondent  
23  
24  
25

1 also indicated on the form that he agreed to share the compensation but  
2 did not disclose with whom.

3  
4 b. Timothy and Julie Larsen (00-07355-PCT SSC): Respondent  
5 misspelled the debtor's name on the petition and then told the debtor  
6 that the Trustee would make the changes to the court records instead of  
7 filing an amendment. Respondent later amended the petition to correct  
8 the spelling of the petitioner's name. Respondent did not pay the filing  
9 fee when he filed the original petition. The debtors testified that they  
10 had paid Respondent the filing fee prior to his filing the petition.  
11 Respondent claimed it was a mistake not to pay at the time of filing.  
12 The Trustee/Complainant asked for a copy of the cancelled check,  
13 which Respondent subsequently failed to provide. The docket does not  
14 show when the filing fee was paid, but it appears from the docket that  
15 no delay in processing the case occurred. Respondent, on the Attorney  
16 Disclosure of Compensation form, checked the "Source" box but did  
17 not specify the source. Respondent also indicated on the form that he  
18 agreed to share the compensation but did not disclose with whom.

19  
20 c. William Griffith and Delain Hunt (00-06978-PCT SSC): Respondent  
21 included on the schedule a 1995 Pontiac, but showed no secured liens  
22 against the vehicle, nor did Respondent indicate that there was any  
23  
24  
25

equity exempted for the vehicle. A further schedule attached to the petition showed that there were \$300 monthly payments being made on the vehicle and the title that the debtors produced did show a lien against the vehicle. Respondent failed to file a Statement of Intent with regard to the vehicle. It appears from the docket that no delay in processing the case occurred, and respondent asserts that all issues were fully resolved during the 341 conference.

- d. Leo and Dorothy Sherman (00-06145-PCT SSC): The petition was filed on June 8, 2000 and a motion to waive the appearance of Mr. Sherman was filed by Respondent on July 6, 2000. However, Respondent failed to attach an order with the motion. Mr. Sherman did not appear at the first meeting of creditors and the Trustee continued the meeting to August 25, 2000. The Trustee then had to continue the August 25, 2000, meeting because he still did not have a copy of the order. The docket reveals that Respondent did not file the order until August 15, 2000. There is no explanation why the Trustee did not receive the order filed on August 15, 2000, in time for the August 25, 2000, meeting. Debtors received their discharge in a timely manner.
- e. Richard Arredondo (00-06251-PCT SSC): Respondent misspelled the debtor's first name on the petition. The petition was filed on June 12,

2000, without any schedules being attached. The debtor needed an emergency filing in order to protect his assets from immediate creditor action. For this reason, the petition was prepared and filed on an expedited basis. The petition was later amended to show the debtor's correct name, and further information was provided to the court as it was obtained. The court filed a motion to dismiss thirty-eight days later, necessitating Respondent's having to file a Motion to Reinstate on August 1, 2000. Respondent asserts that the case was delayed and complicated by the time it took to get necessary information from the client. Respondent, on the Attorney Disclosure of Compensation form, checked the "Source" box but did not specify the source. Respondent also indicated on the form that he agreed to share the compensation but did not disclose with whom. The case was later reinstated and properly processed.

- f. Bret Brungraber (00-05324-PCT SSC): On the Schedule B it listed only "\$50 - clothing". At the first meeting of creditors, the debtor claimed that he was unaware that this was all that the schedule showed as he had household goods and a 1975 travel trailer. Also, the debtor had not signed the declaration. Respondent filed the Declaration on August 9, 2000 but failed to provide a copy to the Trustee. All of these

1 issues were resolved at the 341 conference, and the debtors received a  
2 discharge in a timely fashion.

3  
4 g. Richard and Barbara Begley (00-02739-PCT SSC): Schedule B  
5 showed no business interest or property, yet the Statement of Affairs  
6 filed with the petition showed "leasing" from May 1999 to February,  
7 2000 and that there had been a letter from an attorney that the debtors  
8 had not complied with a Temporary Restraining Order to turn over  
9 partnership property. In the adversary action, Respondent claimed that  
10 the debtors still had unliquidated interest in the partnership that was not  
11 disclosed in the petition. The Begleys needed an emergency filing  
12 because of an imminent garnishment on Mrs. Begley, who was the  
13 chief teller at a local bank. At the time, Respondent was under the  
14 belief that the partnership had been terminated by the judgment from  
15 their former partners which resulted in the imminent wage  
16 garnishment. Respondent believed the doctrine of *res judicata* and  
17 compulsory counterclaims would have extinguished any claims the  
18 debtors may have had to the partnership assets. When the former  
19 partners filed an adversary proceeding to have their debt declared to be  
20 non-dischargeable, Respondent re-evaluated his position and argued  
21 accordingly in the adversary proceeding.  
22  
23  
24  
25

h. Charles and Cindy Hale (00-03776-PCT SSC): The petition was filed on April 12, 2000, but the schedules were not filed until May 18, 2000, thirty-eight days later. Schedule B showed a "dba Rebel Express" checking account but failed to show any commercial vehicles used in a trucking company. Schedule D showed no secured creditors on business equipment nor was a creditor named Fidelity Capital listed. The Statement of Intent showed a 1991 Fruehauf Trailer being reaffirmed with Fidelity Capital. After the first meeting of creditors, the debtors supplied a copy of the title to the trailer. Schedule I read "unemployed" yet lists a monthly income of \$1,400.00 from some employment. The 1998 and 1999 tax returns referenced in Schedule C showed substantial income from work in the trucking business, yet the Statement of Financial Affairs made no mention of any business. The Hales required an emergency filing to protect the debtors from imminent creditor action. Respondent asserts that this exigent circumstance required filing the petition on limited information. Information was provided to the Court as it was obtained. The docket shows no unusual activity and it appears that issues were resolved at the 341 meeting. A discharge was granted in a timely manner.

1 i. Carolyn Ladner (99-12557-PCT SSC): On Schedule I there was no  
2 employment or marital status listed. The petition was properly  
3 amended to show debtor's proper marital status and employer. At the  
4 first meeting of creditors, the Trustee learned that the debtor was  
5 recently divorced and that the ex-spouse had to pay all of the debt the  
6 debtor was scheduling and until that was done, she retained interest in  
7 her ex-spouse's truck and trailer. Respondent asserts that he does not  
8 recall debtor informing him of her former husband's obligation to pay  
9 debts. This was a no-asset case. Respondent listed 12 creditors with  
10 account numbers missing and 11 creditors as having a claim  
11 "unknown". Respondent provided the Court with all information that  
12 was provided to him by debtor. There was no attempt to schedule a  
13 debtor's examination to obtain more information or take further action  
14 against debtor.  
15

16 j. Penny Wertenburger (99-12006-PCT SSC): Judge Curley issued an  
17 order on October 13, 1999 that the filing fee was to be paid in two  
18 installments. In Respondent's Disclosure of Compensation, he listed  
19 that he had been paid \$450.00 by the debtor. At the first meeting of  
20 creditors, the debtor testified that she had paid Respondent not only his  
21 fees but the filing fee as well. In Schedule A there was a value listed as  
22  
23  
24  
25



1 \$8,000.00 but there was no description listed as required, and there was  
2 also no claim listed as required. On Schedule D it showed a savings  
3 account with \$25, 259.00. The Statement of Intent showed "nothing"  
4 and the marital status on Schedule I was not shown. At the first meeting  
5 of creditors, the debtor testified that she was divorced and that she and  
6 her ex-husband had sold the residence and divided the proceeds  
7 between them, yet after further questioning, the debtor stated that she  
8 was back together with her ex-spouse living in the residence.  
9 Respondent claims that the debtor's living arrangement with her former  
10 spouse is legally irrelevant. He further claims that the mistakes on the  
11 schedules were fully resolved at the 341 conference, and the case was  
12 not delayed.  
13  
14  
15

16 3. Daniel Furlong, a bankruptcy practitioner, also wrote the State Bar with  
17 concerns about Respondent's bankruptcy practice and clients as follows:  
18

- 19 a. Sonia Guerra (01-07515-PCT SSC): Respondent collected the filing  
20 fees from his client prior to filing the bankruptcy petition, but failed to  
21 pay the filing fees at the time the petition was filed with the Bankruptcy  
22 Court in violation of the bankruptcy rules. The debtor failed to appear  
23 at the first meeting of creditors, and Respondent asked for the meeting  
24 to be continued. Respondent failed to note the continued date on his  
25

1 calendar. As a result, Respondent did not appear at the rescheduled  
2 meeting. The bankruptcy trustee filed a motion to dismiss for failure to  
3 appear. In the response to the motion to dismiss, respondent claimed  
4 that he and his client did not appear because they had not received any  
5 notice from the bankruptcy court. However, the usual practice in  
6 bankruptcy court is that the trustee does not send a new notice for a  
7 first meeting of creditors that had been orally continued. In his  
8 Response to Debtor's Objection to Dismissal, the Trustee made no  
9 objection to the debtor's request to deep the case pending. The motion  
10 to dismiss was denied.  
11  
12

13  
14 b. Cristin Vicente (01-10643-PCT SSC): Respondent collected the filing  
15 fees from his client prior to filing the bankruptcy petition, but failed to  
16 pay the filing fees at the time the petition was filed with the Bankruptcy  
17 Court in violation of the bankruptcy rules. Respondent promptly paid  
18 upon notice of omission. The debtor received her discharge in a timely  
19 manner.  
20

21 c. William Ryan (01-11399-PCT SSC): Respondent collected the filing  
22 fees from his client prior to filing the bankruptcy petition, but failed to  
23 pay the filing fees at the time the petition was filed with the Bankruptcy  
24 Court in violation of the bankruptcy rules. Respondent promptly paid  
25

1 upon notice of omission. Debtor received discharge in a timely  
2 manner.

3  
4 d. Dola Gruwell (01-05011-PCT SSC): Respondent signed a "Statement  
5 of Financial Affairs" document and a "Separate Statement of Intent" as  
6 "William Fortner for" on the signature line for the debtor. These forms  
7 must be signed by the debtor, and clearly state that they are to be signed  
8 by the debtor "under penalty of perjury". When the court granted  
9 Respondent's motion to withdraw on December 21, 2001, the court  
10 noted that Respondent had improperly signed the forms. In a hearing  
11 on Respondent's motion for reconsideration of its December 21, 2001  
12 order, the court again reaffirmed its prior finding and ruling.  
13

14  
15 e. Kenneth Nilson (01-04945-PCT SSC): Respondent collected the filing  
16 fees from his client prior to filing the bankruptcy petition, but failed to  
17 pay the filing fees at the time the petition was filed with the Bankruptcy  
18 Court in violation of the bankruptcy rules. Respondent promptly paid  
19 the fee upon notice of omission. Respondent also failed to file the  
20 Statement of Financial Affairs with the petition. Debtor received  
21 discharge in a timely manner.  
22

23  
24 f. Theodore Nelson (01-05014-PCT SSC): Respondent collected the  
25 filing fees from his client prior to filing the bankruptcy petition, but

1 failed to pay the filing fees at the time the petition was filed with the  
2 Bankruptcy Court in violation of the bankruptcy rules.

3  
4 **COUNT TWO (Trust Account Matters)**

5 4. As a result of the investigation into the allegations involved in Count One of  
6 this complaint, Respondent was requested to provide trust account records  
7 regarding his bankruptcy clients.

8  
9 5. A review by the State Bar's Staff Examiner found:

10 a. Respondent failed to deposit advanced client funds into his trust  
11 account and instead deposited them into his general operating account.

12 Respondent asserts that he deposited the funds into his operating  
13 account based upon his belief that this was the proper procedure for  
14 prepaid costs.  
15

16 b. Respondent received the filing fees from his clients before he filed their  
17 petitions with the bankruptcy court. In five instances, Respondent's  
18 account was overdrawn prior to the payment of the filing fee thereby  
19 causing a temporary conversion of those five client's funds for the  
20 payment of the bankruptcy court filing fee. Four of the five alleged  
21 instances of his account being overdrawn occurred over a four-day  
22 period between January 18 to January 21, 2001, while Respondent was  
23 out of town attending to an urgent family matter. During this time,  
24  
25

1 funds were received by Respondent's staff but were not deposited into  
2 his operating account.

- 3  
4 c. In the Sonia Guerra bankruptcy matter referenced in Count One above,  
5 Respondent's records clearly showed that the client had paid the filing  
6 fee prior to the filing of the bankruptcy petition.

7  
8 **COUNT THREE (Prior Discipline)**

- 9 6. Respondent has previously been sanctioned for violations of the Rules of  
10 Professional Conduct. Specifically, in file numbers 83-0391, 83-0392 and 83-  
11 0393, Respondent was placed on indefinite suspension by order filed on  
12 November 15, 1983, for violations of DRs 1-102(A)(5) and (6), 6-101(A)(2),  
13 7-101(A)(3), 7-102(A)(1) and (2), and 8-102(B), Ariz.R.S.Ct. Also in File  
14 No. 00-0215, Respondent received an Informal Reprimand by Order filed  
15 June 29, 2000, for violations of Rule 42, ERs 4.1(a) and 8.1(c), Ariz.R.S.Ct.  
16 for false notarization of an affidavit. The entire record in that case may be  
17 reviewed by the hearing committee or hearing officer, with or without  
18 respondent's consent, following a decision on the merits, pursuant to Rule  
19 53(c) and Rule 54(k)(4), Ariz.R.S.Ct.  
20  
21  
22  
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25



1 Ariz.R.S.Ct., specifically ER 1.3, 5.3 and 8.4(d).

2 Count Two: Respondent conditionally admits his conduct violates Rule 42,  
3 Ariz.R.S.Ct., specifically ER 1.15 and Rules 43 and 44, Ariz.R.S.Ct.  
4

5 Count Three: Respondent conditionally admits the prior discipline identified  
6 above.

7 **DISMISSED ALLEGATIONS**

8 The parties have agreed that the alleged violations of ER 3.3, 4.1 and 8.4(c)  
9 contained in Count One be dismissed. In the course of preparing this matter for  
10 hearing, the State Bar retained an expert, who would opine that Respondent could not  
11 sign the forms for debtor Dola Gruwell as set forth in subparagraph (d) of Count One  
12 without filing a power of attorney allowing him to do so. However, the State Bar  
13 conditionally admits that it cannot prove by clear and convincing evidence that  
14 Respondent's signing the forms on behalf of the debtor was dishonest, fraudulent,  
15 deceitful or misleading.  
16  
17

18 No alleged violations are being dismissed from Counts Two or Three.  
19

20 **SANCTION**

21 Respondent and the State Bar agree that on the basis of the conditional  
22 admissions contained herein, the appropriate sanction is as follows:  
23

- 24 1. Respondent shall receive a censure for his conduct.  
25

1       2. Respondent shall be placed on probation for a period of two (2) years. The  
2 terms of probation shall be as follows:

3           a.       Respondent shall, within thirty (30) days of the Supreme Court's final  
4 judgment and order, contact the director of the State Bar's Law Office Management  
5 Assistance Program (LOMAP) to schedule an audit of his law office. The  
6 LOMAP director or her designee will conduct an audit of Respondent's law office  
7 no later than sixty (60) days thereafter. Following the audit, Respondent shall  
8 enter into a Memorandum of Understanding that will be effective for a period of  
9 two years from the date upon which all parties have signed the Memorandum.  
10 Respondent shall comply with all recommendations of the LOMAP director or her  
11 designee.  
12

13           b.       Respondent shall find a practice monitor who shall be approved by the  
14 State Bar. The practice monitor shall be an attorney who will supervise  
15 Respondent's quality of services rendered, Respondent's supervision of non-  
16 attorney staff and Respondent's supervision of his trust account. The practice  
17 monitor shall submit quarterly reports to the State Bar, and the practice monitor  
18 will agree to report to the State Bar any manifestation or relapse, unusual behavior,  
19 or conduct falling below minimum standards of the profession as set forth in the  
20 Rules of Professional Conduct, Rule 42, Ariz. R. S. Ct.  
21  
22  
23  
24  
25



1 c. Respondent shall be responsible for the costs and expenses associated  
2 with his participation in the LOMAP program.

3 d. In the event Respondent fails to comply with any of the foregoing  
4 terms, and information thereof is received by the State Bar, bar counsel shall file  
5 with the Hearing Officer a Notice of Non-Compliance. The Hearing Officer shall  
6 conduct a hearing at the earliest possible date, but in no event less than thirty (30)  
7 days following receipt of notice, to determine whether a condition of probation  
8 has been breached and, if so, to recommend an appropriate sanction.  
9

10 e. In the event there is an allegation that any of these terms have been  
11 breached, the burden shall be on the State Bar to prove non-compliance by a  
12 preponderance of the evidence.  
13

14 3. Respondent shall pay the costs incurred in these disciplinary  
15 proceedings. Attached hereto is a statement of costs and expenses incurred by the  
16 State Bar of Arizona in these disciplinary proceedings.  
17

18 4. Respondent does not owe any restitution in this case. In count one,  
19 Respondent was able to correct any errors that occurred and completed the  
20 bankruptcy cases. In addition, none of the identified clients filed charges with the  
21 State Bar regarding Respondent's handling of their cases, or made any claims that  
22 they were owed any refund of fees. In file 02-0790, respondent completed the work  
23 for the client, and the client did not allege he was owed any refund of fees. In file  
24  
25

1 no. 02-2093, the complainant was the opposing party, not respondent's client.  
2 Respondent's client did not make any complaint to the State Bar concerning  
3 Respondent's conduct, and did not make any claim concerning fees. In file no. 03-  
4 0097, the client owed Respondent a small amount of money at the time of  
5 termination. The client does not challenge the fee charged by Respondent.  
6

7         Respondent conditionally admits that he has engaged in the conduct set  
8 forth above and the rule violations indicated, in exchange for the form of  
9 discipline as set forth above.  
10

11         Respondent, by entering into this agreement, waives his right to a formal  
12 disciplinary hearing that he would otherwise be entitled to pursuant to Rule 53 (c) 6,  
13 Ariz.R.S.Ct., and the right to testify or present witnesses on his behalf at a hearing.  
14

15         Respondent further waives all motions, defenses, objections, or requests  
16 which he has made or raised, or could assert hereinafter, if the conditional  
17 admissions and stated form of discipline are approved. Respondent is represented  
18 by his counsel, J. Scott Rhodes, in these proceedings.  
19

20         This Tender of Admissions and Agreement for Discipline by Consent will be  
21 submitted to the Disciplinary Commission for review. Respondent realizes that the  
22 Disciplinary Commission may request his presence at a hearing for presentation of  
23 evidence and/or argument in support of this agreement. Respondent further  
24 recognizes that the Disciplinary Commission may reject this agreement and the  
25

1 Arizona Supreme Court may accept or reject the Disciplinary Commission's  
2 recommendations. If the agreement is rejected at any time, Respondent's  
3 conditional admissions are withdrawn.  
4

5 **This agreement, with conditional admissions, is submitted freely and**  
6 **voluntarily and not under coercion or intimidation. I am aware of the Rules**  
7 **of the Supreme Court with respect to discipline and reinstatement.**

8  
9 **DATED** this 26<sup>th</sup> day of June, 2003.

10  
11   
12 **William B. Fortner**  
13 **Respondent**

14  
15  
16 **J. Scott Rhodes**  
17 **Attorney for Respondent**

18 **DATED** this \_\_\_\_\_ day of June, 2003.

19  
20  
21 **Karen Clark**  
22 **Senior Bar Counsel**

23 **Approved as to form and content:**

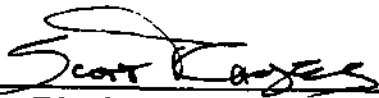
24  
25 **Robert Van Wyck**  
**Chief Bar Counsel**

1 Arizona Supreme Court may accept or reject the Disciplinary Commission's  
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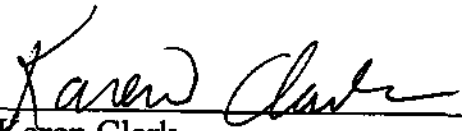
5 This agreement, with conditional admissions, is submitted freely and  
6 voluntarily and not under coercion or intimidation. I am aware of the Rules  
7 of the Supreme Court with respect to discipline and reinstatement.  
8

9 DATED this 27<sup>th</sup> day of June, 2003.

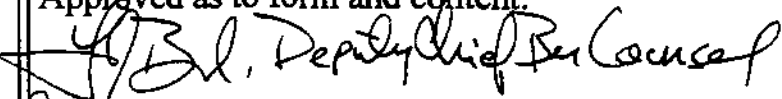
10  
11  
12 William B. Fortner  
13 Respondent

14  
15   
16 J. Scott Rhodes  
17 Attorney for Respondent

18 DATED this 26<sup>th</sup> day of June, 2003.

19  
20   
21 Karen Clark  
22 Senior Bar Counsel

23 Approved as to form and content:

24   
25

Robert Van Wyck  
Chief Bar Counsel

1 Original filed this 27<sup>th</sup> day of  
2 June, 2003 with:

3 Disciplinary Clerk of the Supreme Court  
4 Certification and Licensing Division  
5 1501 W. Washington, #104  
6 Phoenix, Arizona 85007-3329

7 Copy of the foregoing mailed this  
8 27<sup>th</sup> day of June, 2003 to:

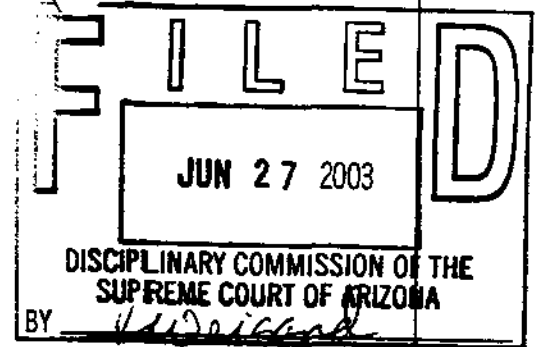
9 Karen Clark, Esq.  
10 Staff Bar Counsel  
11 State Bar of Arizona  
12 111 West Monroe, Suite 1800  
13 Phoenix, AZ 85003

14 Copy of the foregoing hand delivered this  
15 27<sup>th</sup> day of June, 2003 to:

16 Dee Steadman  
17 Lawyer Regulation Records Manager  
18 State Bar of Arizona  
19 111 West Monroe Street, Suite 1800  
20 Phoenix, Arizona 85003

21 by: Mary J. Lisk  
22  
23  
24  
25

1 Karen Clark, Bar No. 012665  
2 Senior Bar Counsel  
3 State Bar of Arizona  
4 111 West Monroe, Suite 1800  
5 Phoenix, Arizona 85003-1742  
6 Telephone (602) 340-7247



7  
8 **BEFORE THE DISCIPLINARY COMMISSION**  
9 **OF THE SUPREME COURT OF ARIZONA**

10 IN THE MATTER OF A MEMBER )  
11 OF THE STATE BAR OF ARIZONA, )

File Nos. 00-1999, 02-0790, 02-2093  
and 03-0097

12 **WILLIAM B. FORTNER,** )  
13 Bar No. 004923 )

Respondent. )

**JOINT MEMORANDUM IN**  
**SUPPORT OF AGREEMENT**  
**FOR DISCIPLINE BY**  
**CONSENT**

14 The State Bar and Respondent, through his counsel J. Scott Rhodes, submit  
15 this Joint Memorandum in support of the Agreement for Discipline by Consent  
16 filed contemporaneously herewith.

17  
18 As reflected in the Tender of Admissions and Agreement for Discipline by  
19 Consent, Respondent violated the Rules of Professional Conduct by failing to  
20 diligently represent clients and failing to adequately supervise non-lawyer staff.  
21 Respondent also failed to properly manage his client trust account. Respondent  
22 violated Rule 42, Ariz.R.S.Ct., specifically ER 1.3, 1.15, 5.3 and 8.4(d) and  
23 Rules 43 and 44, Ariz.R.S.Ct.  
24  
25

Respondent has agreed to accept a censure and costs, subject to review and acceptance by the Disciplinary Commission. Restitution is not required in this case. Respondent will be placed on probation for a term of two years, to include terms as set forth in the Tender of Admissions and Agreement for Discipline by Consent.

### SANCTION

Respondent agrees to accept censure and payment of the costs and expenses of the disciplinary proceedings as the appropriate sanction in this matter.

In determining the appropriate sanction, the parties considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and Arizona case law.

### STANDARDS

The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Court and Commission consider the *Standards* a suitable guideline. *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1009); *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274 (1994).

In determining an appropriate sanction, both the Court and the Commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors.

1 *Matter of Tarlitz*, 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.  
2 *Standards* 4.13, 4.43, 6.23 and 7.3 apply to Respondent's conduct in this matter.

3  
4 Concerning the violations involving Respondent's trust account, *Standard*  
5 4.1 is applicable. *Standard* 4.13 states that reprimand (censure in Arizona) is  
6 generally appropriate when a lawyer is negligent in dealing with client property and  
7 causes injury or potential injury to a client.

8  
9 In the present case, Respondent was negligent in administering his trust  
10 account. He failed to deposit bankruptcy filing fees advanced by his clients into  
11 his trust account, and instead deposited these funds into his general operating  
12 account. Respondent did not realize that these funds could not be deposited into  
13 his operating account. Respondent did not knowingly mishandle his trust  
14 account. Therefore, the sanction of censure is appropriate under the  
15 circumstances.  
16

17 Respondent also engaged in a pattern of not being diligent in representing  
18 his clients and in supervising his non-lawyer staff. *Standards* 4.43, 6.23 and 7.3  
19 apply in such cases. *Standard* 4.43 states that reprimand is generally appropriate  
20 when a lawyer is negligent and does not act with reasonable diligence in  
21 representing a client, and causes injury or potential injury to a client. *Standard*  
22 6.23 states that reprimand is generally appropriate when a lawyer negligently  
23 fails to comply with a court order or rule, and causes injury or potential injury to  
24  
25



1 a client or other party, or causes interference or potential interference with a legal  
2 proceeding. *Standard 7.3* states that reprimand is generally appropriate when a  
3 lawyer negligently engages in conduct that is a violation of a duty owed to the  
4 profession, and causes injury or potential injury to a client, the public or the legal  
5 system.  
6

7         Respondent did not diligently pursue his clients' bankruptcy cases by  
8 failing to make sure that the documents filled out by his non-lawyer staff with the  
9 clients' information and filed with the court were complete and accurate. Again,  
10 Respondent did not knowingly engage in this misconduct. Rather, his conduct  
11 was negligent, and the sanction of censure is appropriate under these  
12 circumstances.  
13  
14

15         Next, the *Standards* indicate aggravating and mitigating circumstances be  
16 considered in determining the appropriate sanction. An analysis of the  
17 aggravating and mitigating factors support the imposition of a censure in this  
18 matter.  
19

20         Aggravating Factors:

21         *Standard 9.22(a)* – prior disciplinary record. Respondent was placed on an  
22 indefinite suspension in 1983, and received an informal reprimand in 2000.  
23 Respondent's previous discipline is more fully set forth in the Tender of  
24 Admissions and Count Three of the complaint.  
25

1        *Standard 9.22(c)* - pattern of misconduct. The present cases show a pattern  
2 of negligently failing to diligently pursue the client's cases and failing to supervise  
3 his non-lawyer staff.  
4

5        *Standard 9.22(d)* - multiple offenses. The present case involves  
6 representation of multiple bankruptcy clients.

7        *Standard 9.22(i)* - substantial experience in the practice of law. Respondent  
8 was admitted to practice law in Arizona in 1977.  
9

10        Mitigating Factors:

11        *Standard 9.32(b)* – absence of a selfish or dishonest motive. None of  
12 Respondent's conduct was motivated by self-interest.  
13

14        *Standard 9.32(d)* – timely good faith effort to rectify the consequences of  
15 misconduct. In regard especially to the bankruptcy matters in Count One,  
16 Respondent made timely efforts to rectify negligent errors made. As a result, it  
17 appears that none of the matters resulted in significant delay or prejudice to the  
18 clients.  
19

20        *Standard 9.32(e)* – full and free disclosure/cooperation toward proceedings.  
21 Respondent was forthcoming and cooperative throughout the investigative stage of  
22 these proceedings and continued to be cooperative after the filing of a formal  
23 complaint.  
24  
25

1        *Standard 9.32(l)* – remorse. Respondent has exhibited remorse and  
2 willingness to improve his practice by cooperation with LOMAP.

3        *Standard 9.32(m)* – remoteness of prior offense. This mitigating factor  
4 applies only to Respondent's indefinite suspension in 1983.  
5

6        A review of the aggravating and mitigating factors support the  
7 presumptive sanction of censure as an appropriate sanction in this case.  
8

### 9                                PROPORTIONALITY

10        To have an effective system of professional sanctions, there must be  
11 internal consistency, and it is appropriate to examine sanctions imposed in cases  
12 that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567  
13 (1994), (quoting *In re Wines*, 135, Ariz. 203, 207 (1983)). However, the  
14 discipline in each case must be tailored to the individual case, as neither  
15 perfection nor absolute uniformity can be achieved. *Matter of Riley*, 142 Ariz.  
16 604, 615 (1984). Pursuant to the *Standards* and *In re Cassalia*, 173 Ariz. 372,  
17 843 P.2d 654 (1992), where there are multiple acts of misconduct, the  
18 Respondent should receive one sanction consistent with the most serious instance  
19 of misconduct, and the other acts should be considered as aggravating factors.  
20  
21

22        The most serious instance of misconduct in this case involves  
23 Respondent's misuse of his trust account. The following cases are instructive  
24 concerning this misconduct.  
25

1 In *Matter of Leiber*, 2001 Ariz. LEXIS 95, SB-01-0122-D (July 2, 2001),  
2 Leiber voluntarily reported himself for depositing personal funds into his trust  
3 account for a number of years. These funds were "earned upon receipt" fees or  
4 other fees collected for services Leiber had rendered to clients. The Commission  
5 found that Leiber's negligent management of his trust account and failure to  
6 safeguard client funds could have potentially harmed clients; however, given the  
7 fact that there was no actual harm, dishonesty or self dealing, the Commission  
8 found that a censure was the appropriate sanction.  
9  
10

11 In the present matter, Respondent failed to place the filing fees his clients  
12 gave him into his trust account in the mistaken belief that he could put those fees  
13 into his general operating account. As in *Leiber*, there was a potential for harm  
14 to the clients, but no actual harm, dishonesty or self-dealing. Therefore, a  
15 censure is an appropriate sanction under the precedent set in *Leiber*.  
16

17 In *Matter of Groves*, Comm. No. 91-0565, 91-0918 and 91-1101 (July 15,  
18 1996), Groves consented to receive a censure and be placed on two years  
19 probation. Groves represented landlords and property management companies in  
20 forcible entry and detainer and garnishment actions. Groves admitted that he  
21 failed to deposit garnishment funds he received into his trust account, instead  
22 depositing and disbursing them from his general business account.  
23  
24  
25

1 In the present matter, Respondent similarly failed to place filing fees  
2 advanced by his clients into his trust account in the mistaken belief that he could  
3 put those fees into his general operating account and disburse them from the  
4 general operating account. Again while the potential for any client harm was  
5 present, there was no actual harm, dishonesty of self-dealing, so that a censure is  
6 an appropriate sanction.  
7

8  
9 The other acts of misconduct involved in this case, including the lack of  
10 diligence and failure to properly supervise non-lawyer staff, also show that a  
11 censure is the proper sanction in this matter.

12 In *Matter of Heldenbrand*, SB-99-0089-D (January 13, 2000), Heldenbrand  
13 consented to a censure for violation of, among other violations, ER 1.3, 1.15, 5.3  
14 and Rules 43 and 44, Ariz.R.S.Ct. that arose from his negligent management and  
15 supervision of his employees pursuant to a business agreement with a company that  
16 assisted him in the collection, garnishment and eviction of tenants for landlord and  
17 property management companies. For his conduct, Heldenbrand was censured and  
18 placed on two years probation. The terms of probation included participation in  
19 LOMAP.  
20

21  
22 In *Matter of Larson*, SB-98-0048-D (July 28, 1998), Larson received a  
23 censure for failing to properly supervise a non-lawyer staff member of his old firm  
24 which led to a client believing that the non-lawyer staff member was acting under  
25

1 Larson's authority when the non-lawyer staff member signed the clients up as  
2 clients of Larson. Larson also failed to diligently see that a bankruptcy case got its  
3 plan approved, even though it was an associate from his firm that had been  
4 handling the matter. The Disciplinary Commission agreed that Larson's conduct  
5 was negligent and found a censure to be the appropriate sanction.  
6

7         In the instant case, Respondent failed to ensure that his non-lawyer staff  
8 properly prepared and filed all of the paperwork and/or the filing fees necessary for  
9 the bankruptcy filings. When he learned of the problems, Respondent corrected the  
10 matters with no actual harm to his clients, similar to the lawyer in *Heldenbrand*.  
11 Therefore, in this case, the sanction of a censure and payment of costs is  
12 appropriate.  
13  
14

15         In *Matter of Seplow*, 2002 Ariz. LEXIS 172, SB-02-0108-D (October 8,  
16 2002) Seplow received a censure for, among other violations, failure to provide  
17 competent representation, failure to act with reasonable diligence, failure to  
18 supervise non-lawyer staff and conduct prejudicial to the administration of justice,  
19 in violation of ERs 1.1, 1.4, 5.3 and 8.4(d). The Commission agreed with the  
20 hearing officer that Seplow's conduct was negligent and therefore agreed that a  
21 censure and probation was appropriate.  
22  
23

24         In the instant case, Respondent failed to diligently represent his clients,  
25 failed to properly supervise non-lawyer staff, and was involved in conduct that was

1 prejudicial to the administration of justice. Like *Seplow*, Respondent's conduct here  
2 was due to negligence and was not intentional. Censure is the appropriate sanction.  
3


4 In *Matter of Schlievert*, 2002 Ariz. LEXIS 126, SB-02-0110-D, (August 1,  
5 2002), Schlievert received a censure for, among other violations, failure to follow  
6 his clients' directions concerning the representation and failure to return the clients'  
7 property at the end of the representation, in violation of ERs 1.2 and 1.16(d). Many  
8 of the same mitigating factors that are present in this matter were present in  
9 *Schlievert*, and the Disciplinary Commission and the Court accepted the agreement  
10 for a censure.  
11

12 In file 02-0790, Respondent failed to follow his clients' directions  
13 concerning the representation and failed to properly withdraw at the end of the  
14 representation. Like *Schlievert*, many of the same mitigating factors are present in  
15 this matter, making censure a proper sanction.  
16

### 17 CONCLUSION

18 The objective of lawyer discipline is not to punish the lawyer, but to protect  
19 the public, the profession, and the administration of justice. *In re Neville*, 147 Ariz.  
20 106, 708 P.2d 1297 (1985). Recognizing it is the prerogative of the Disciplinary  
21 Commission to determine the appropriate sanction, the State Bar and Respondent  
22 assert the objectives of discipline will be met by the imposition of the proposed  
23 sanction of a censure, two years probation and costs.  
24  
25

1       **DATED** this 26<sup>th</sup> day of June, 2003.

2  
3  
4         
5       William B. Forner  
6       Respondent

7  
8       \_\_\_\_\_  
9       J. Scott Rhodes  
10      Attorney for Respondent

11      **DATED** this \_\_\_\_ day of June, 2003.

12  
13      \_\_\_\_\_  
14      Karen Clark  
15      Senior Bar Counsel

16      Approved as to form and content:

17  
18      \_\_\_\_\_  
19      Robert Van Wyck  
20      Chief Bar Counsel

21      Original filed this \_\_\_\_ day of  
22      June, 2003 with:

23      Disciplinary Clerk of the Supreme Court  
24      Certification and Licensing Division  
25      1501 W. Washington, #104  
        Phoenix, Arizona 85007-3329

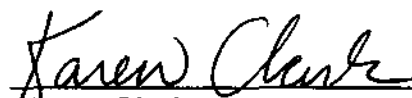


1 DATED this 27<sup>th</sup> day of June, 2003.

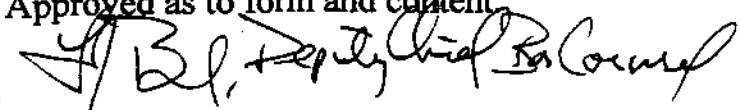
2  
3  
4 William B. Fortner  
5 Respondent

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7  
8   
9 J. Scott Rhodes  
10 Attorney for Respondent

11 DATED this 26<sup>th</sup> day of June, 2003.

12  
13   
14 Karen Clark  
15 Senior Bar Counsel

16 Approved as to form and content:

17 

18 Robert Van Wyck  
19 Chief Bar Counsel

20 Original filed this 27<sup>th</sup> day of  
21 June, 2003 with:

22 Disciplinary Clerk of the Supreme Court  
23 Certification and Licensing Division  
24 1501 W. Washington, #104  
25 Phoenix, Arizona 85007-3329

1 Copy of the foregoing mailed this  
2 27<sup>th</sup> day of June, 2003 to:

3 Karen Clark, Esq.  
4 Staff Bar Counsel  
5 State Bar of Arizona  
6 111 West Monroe, Suite 1800  
7 Phoenix, AZ 85003

8 Copy of the foregoing hand-delivered this  
9 27<sup>th</sup> day of June, 2003 to:

10 Dee Steadman  
11 Lawyer Regulation Records Manager  
12 State Bar of Arizona  
13 111 West Monroe Street, Suite 1800  
14 Phoenix, Arizona 85003

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by: Mary J. Ziska